

EXECUTIVE CHAMBERS

HONOLULU

July 13, 2004

STATEMENT OF OBJECTIONS TO SENATE BILL NO. 2056

Honorable Members
Twenty-Second Legislature
State of Hawaii

Pursuant to Section 16 of Article III of the Constitution of the State of Hawaii, I am returning herewith, without my approval, Senate Bill No. 2056, entitled "A Bill for an Act Relating to the Auditor."

The purpose of this bill is to make the Legislative Auditor (hereinafter referred to as the "Auditor") an authorized representative of the Department of Education (DOE) and the Department of Health (DOH). The bill also gives the Auditor access to any student records that may be necessary in connection with any audit or evaluation of any federal or state supported educational program, or in connection with the enforcement of the federal or state legal requirements that relate to the educational program.

This bill is objectionable because there are serious legal concerns about making the Auditor an authorized representative of the DOE and the DOH. This bill is an attempt to circumvent federal law. The Auditor is seeking to become an authorized representative of the DOE and the DOH because of the Family Educational and Privacy Rights Act (FERPA), 20 U.S.C. § 1232g, which prohibits the DOE from disclosing educational records or personally identifiable information without the written consent of the student or parent, except under specific exceptions listed in 20 U.S.C. § 1232g(b). One of the exceptions permits authorized representatives of state educational authorities to access education records without written consent of the student or parent. Specifically, this exception is for authorized representatives of state educational authorities

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acting in connection with an audit and evaluation of federally supported education programs or who are acting in connection with the enforcement of federal legal requirements relating to such programs.

The Family Policy Compliance Office, United States Department of Education, which is the federal agency authorized to administer FERPA, has informed us that the FERPA exception in question applies to an executive branch auditor or an outside auditor controlled by the educational agency, but would not apply to a legislative branch auditor. Therefore, the FERPA exception for "authorized representatives" does not permit the DOE to disclose education records to the Auditor.

In addition, this bill is unnecessary because the Auditor has the power to issue subpoenas duces tecum for education records under section 23-5(c)(2), Hawaii Revised Statutes. Under FERPA, the DOE may disclose the education records pursuant to a subpoena provided that parents of the children identified in the education records are notified of the subpoena so that they may act to quash the subpoena if they so choose. This bill also contains a parental notification provision so this bill does not expedite access by the Auditor.

This bill seeks to provide an alternative method for the Auditor to obtain education records without having to use her subpoena powers, but this alternative method involves significant risks to the State. The disclosure of education records without a subpoena could result in expensive lawsuits filed by parents challenging this bill as an attempt to circumvent federal law. There already is a valid means under FERPA by which the Auditor may access education records through her subpoena powers. The risk to the State in creating another access method with inherent legal problems clearly outweighs any benefits that an alternative method of access may provide.

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For the foregoing reasons, I am returning Senate Bill
No. 2056 without my approval.

Respectfully,

LINDA LINGLE
Governor of Hawaii